

REMARKS

Claims 1-26 are pending in the application and stand rejected.

Independent Claims 1, 7, 14, 15, 16, 21, 22, 23, 24, 25 and 26 have been amended to positively recite that their respective preambles as limitations. Thus, support for the amendments can be found in the preamble of the claims themselves. Dependent Claims 2-6, 8-13 and 17-20 have been amended by replacing the first word "A" with "The." It is believed this amendment is merely cosmetic and thus no new matter has been added.

Claims 1-4, 6-10, 13-19 and 21-26 were rejected under 35 U.S.C. 102(b) as anticipated by EP 0850569. The Office action took the position that the '569 patent teaches a pet food containing inulin and teaches the growth of lactic and bifido-bacteria at the cost of pathogenic bacteria and that the method prevents and treats diarrhea, increases growth, improves the ability to breed and enhances health. The Office action indicated that the enhancement of health inherently would increase pet activity.

Applicants respectfully disagree. Applicants submit that enhanced health does not inherently increase the activity of a pet. To satisfy the test for inherency an increase in pet activity would necessarily have to follow from an improvement in pet health. That condition simply is not met under the present circumstances. For example, a pet may be a normal active pet or even an anxious pet that is overly active. While such a pet could benefit from improved health by consuming the pet food of the '569 patent, it would not necessarily follow that such a pet would have improved activity as required for inherency. Also, a pet may ingest the pet food of the '569 patent and may benefit from improved health but not to such an extent that the activity of the pet is improved as would be required for inherency. Thus, it cannot be said that improved health would inherently improve the activity of a pet. For this reason Applicant submits that independent Claims 1, 7, 14, 15, 16, 21, 22, 23, 24, 25 and 26 are novel over EP 0850569 which fails to disclose either literally or inherently improving pet activity (Claims 1, 7, 14, 15, 21, 23, 24, 25), ameliorating joint stiffness (Claim 16), providing the pet with more energy (Claim 22) or returning a pet to a previous level of liveliness (Claim 26).

Claims 1-4, 6-10, 13-19 and 21-26 were rejected under 35 U.S.C. 102(e) as anticipated by WO 99/22604. The Office action took the position that the '604 disclosure teaches a pet food containing chicory which is said to promote the growth of beneficial colonic bacteria. The

Office action indicates that the application teaches that this has a beneficial effect on the pet's overall health. The Office action indicated that the enhancement of health inherently would increase pet activity.

Applicants submit that the beneficial effect in WO 99/22604 is limited to a beneficial effect on colonic health, rather than overall health as indicted in the Office action. Nevertheless, as Applicants point out above, improved pet activity is not inherent in an improvement in overall health, much less colonic health. Thus, independent Claims 1, 7, 14, 15, 16, 21, 22, 23, 24, 25 and 26 are novel over WO 99/22604 which fails to disclose either literally or inherently improving pet activity (Claims 1, 7, 14, 15, 21, 23, 24, 25), ameliorating joint stiffness (Claim 16), providing the pet with more energy (Claim 22) or returning a pet to a previous level of liveliness (Claim 26).

Claims 1, 3, 7, 8, 11, 13-19 and 22 stand rejected under 35 U.S.C. 102(b) as anticipated by EP 0862863. The Office action took the position that the '863 patent teaches that probiotics are beneficial for gastrointestinal tract health in pets by inhibiting the growth of pathogenic bacteria which produce toxic amine compounds. In addition, it said that the '863 patent teaches that probiotic microorganisms activate the immune function of the host. Further, the Office action took the position that the passage disclosing "a ready-to-eat cereal product to provide a daily amount of about 10^6 to about 10^{12} cells of probiotic micro-organisms" equates with the limitations in Claim 11. The Office action states that improving GI tract health, inhibiting growth and activity of pathogenic bacteria and activating the immune function of a pet would inherently increase pet activity.

Applicants respectfully disagree. First, the '863 application is primarily directed to GI health and maintenance of a healthy colonic flora. Although GI tract health may be a component of good health, it is not an inherent disclosure of increased pet activity. As Applicants point out above, even a normal active pet or an anxious pet that is overly active may benefit from improved GI tract health by consuming the pet food of the '863 patent and not not have improved activity as required for inherency. Also, a pet may ingest the pet food of the '863 patent and may benefit from improved health but not to such an extent that the activity of the pet is improved. Thus, independent Claims 1, 7, 14, 15, 16, 22, are novel over EP 0862863 which

fails to disclose either literally or inherently increasing pet activity (Claims 1, 7, 14, 15), ameliorating joint stiffness (Claim 16), or increasing energy (Claim 22).

With respect to Claim 11 the disclosure at Page 5, line 58 does not disclose pet food that contains about 10^4 to about 10^{10} cells of probiotic micro-organism per gram or any particular amount of probiotic organism in a pet food, rather the disclosure in the '863 patent is directed to the amount of probiotic bacteria to be ingested by an animal or human. Thus, Applicant submits that Claim 11 is novel over the recited disclosure at page 5 line 58 and also for the reasons that its base Claim 7 is allowable.

Claims 1-4, 6-10, 13-19, 21-26 stand rejected under 35 U.S.C. 102(b) as anticipated by *Reinhart* (US Patent 5,776,524). The Office action took the position that *Reinhart* teaches feeding pets 0.2-1 wt% of inulin in a diet that includes corn to reduce pathogenic bacteria and thereby improve GI tract health. Again, the Office action relies on inherency in finding anticipation.

Applicant respectfully disagrees with the position taken in the Office action that *Reinhart* anticipates the present invention. Applicant submits that *Reinhart* fails to literally disclose that administering to a pet a nutritional agent to improve the activity in a pet. As indicated above improved GI tract health is not an inherent disclosure of improved pet activity. Thus, independent Claims 1, 7, 14, 15, 16, 21, 22, 23, 24, 25 and 26 are novel over *Reinhart* which fails to disclose either literally or inherently improving pet activity (Claims 1, 7, 14, 15, 21, 23, 24, 25), ameliorating joint stiffness (Claim 16), providing the pet with more energy (Claim 22) or returning a pet to a previous level of liveliness (Claim 26).

Claims 5 and 7-26 stand rejected under 35 U.S.C. 103(a) as obvious over WO 99/22604, EP 0850569 and *Reinhart* in view of EP 0862863, *Shields* (US Patent 6,156,355) and *Lowe* and further in view of *Bui* (US Patent 6,596,303) and *Bockow* (US Patent 5709855). The Office action took the position that WO 99/22604, EP 0850569 and *Reinhart* teach enhanced health through the promotion of lactic and bifido bacteria but do not teach administering the compositions to elderly dogs or that feeding chicory ameliorates joint stiffness or the addition of long chain fatty acids. EP '863 is relied upon as disclosing that probiotic bacteria aid in reducing pathogenic bacteria and that probiotic bacteria activate immune function. *Shields* is relied upon for its teaching that probiotics and probiotics in a diet for dogs is advantageous for GI function.

Lowe is relied upon for its teaching that reduced digestive tract efficiency occurs as a result of age and infection. The Office action further indicates that although none of the references teach that fatty acids were beneficial, *Nui et al.* and *Bockow* established that omega-3 fatty acids could be used to relieve dogs of degenerative arthritis, tendonitis, etc. through administration of mussel extracts.

Applicants reiterate that none of the recited references literally disclose administering to a pet a nutritional agent that promotes the growth of bifido and lactic bacteria in the gastrointestinal tract of the pet to improve activity in the pet. Moreover, improved activity of the pet is simply not inherent in improved health, nor improved GI tract health, nor improved immune function, nor reduced pathogenic activity, whether in an old dog or in an active healthy pet as is allegedly disclosed in the cited references. There is, in fact nothing in any of the references to suggest or provide any incentive, absent impermissible hindsight gleaned from the present application, to one of skill to feed pets the diet of the invention to improve the activity in a pet since the primary end points of the feeding regimen are aspects of animal health other than pet activity. Using improved health as an end point one of skill could cause one of skill to stop feeding the diet to a pet prior to the time that an improvement in the activity of a pet occurs. For this reason applicants submit that, even if all of the references were properly combinable, the combination does not establish a *prima facie* case of obviousness with respect to independent Claims 1, 7, 14, 15, 16, 21, 22, 23, 24, 25 and 26 because the recited combination does not contain, either literally or inherently, or suggest the limitation of improving pet activity (Claims 1, 7, 14, 15, 21, 23, 24, 25), ameliorating joint stiffness (Claim 16), providing the pet with more energy (Claim 22) or returning a pet to a previous level of liveliness (Claim 26).

For the reasons discussed above Applicants submit that independent Claims 1, 7, 14, 15, 16, 21, 22, 23, 24, 25, and 26 are novel and nonobvious over the art of record. In addition, dependent claims 2-6, 8-13, and 17-20 which depend from these claims are allowable at least for the same reasons. Applicants request that the application be passed to issue.

Respectfully submitted,

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